



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Viereck Co.
File: B-237726
Date: March 20, 1990

John Hartlove, for the protester.
Herbert F. Kelley, Jr., Esq., Office of the Judge Advocate General, Department of the Army, for the agency.
Paula A. Williams, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. A prospective bidder who, at the using agency's request, furnished a specification which the purchasing activity incorporated into its solicitation not knowing that it was descriptive of the protester's product, may not be declared ineligible for any subsequent award under that solicitation on the grounds that the bidder has an organizational conflict of interest where the government had not contracted with that firm to prepare the specification and because the government has an obligation to screen for unduly restrictive specifications furnished by prospective vendors.
2. Bid which offered to supply a machine tool with a hydraulic drive instead of the mechanical drive required by the solicitation specifications was nonresponsive.

DECISION

Viereck Co. protests the award of a contract to Midwest Marketing Services under invitation for bids (IFB) No. DAEA08-89-B-0008, issued by the Department of the Army, 7th Signal Command, Fort Ritchie, Maryland, for a metal punching machine. Viereck contends that the awardee's bid was nonresponsive because the equipment which it offered did not conform to the IFB's specification requirements.

We sustain the protest.

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In brief, this procurement was conducted by Fort Ritchie in support of the White House Communications Agency (WHCA), which had a need to replace certain old or obsolete metal working equipment. Unknown to contracting personnel at Fort Ritchie, until after the award had been protested, the specifications which had been provided to them by WHCA had been obtained from Viereck. These specifications were descriptive of the machine Viereck had bid, but would exclude the awardee's--an unintended result, according to WHCA, which states that either bidder's design would meet its needs.

The record shows that when the need for replacing the older machinery arose, WHCA tasked a senior noncommissioned officer and master machinist to draw up the requirements for the replacement equipment. In an affidavit furnished with the Army's report, this technical representative states that to this end he first contacted the Phillips Corporation, the firm which had made several of the machines that were being replaced, to obtain certain information and was referred to Viereck, which is owned by Phillips and is a machine tool distributor. The technical representative obtained brochures on equipment and prices from Viereck and an oral "quote" from the protester which was used "to prepare our budget." Not knowing "how to write specifications," the technical representative states that he asked Viereck for "specifications 'for a punch that would meet military specifications.'" In response, Viereck furnished the WHCA representative a document entitled "Government Purchase Description Strippit Super AG" which the representative in turn forwarded to the contracting officials at Fort Ritchie.

This "Government Purchase Description" refers to, and amends, military specification MIL-P-80072B, which covers power driven metal punching machines of the type procured here. Because a copy of this military specification was not readily available to the personnel at Fort Ritchie, they asked the WHCA representative for a copy. This document, too, was obtained from Viereck, forwarded to Fort Ritchie, and incorporated into the solicitation.

The solicitation's bid schedule requested prices, and "manufacturer's name, brand and model number," for supplying a punch machine and certain accessory punches and dies, in accordance with the attached statement of work and military specification MIL-P-80072A. Paragraph 3.4.3 of the military specification provides with regard to the machine drive that:

"Unless otherwise specified, the punching action of the machine shall be accomplished by either a mechanical type drive or a hydraulic type drive. When only one type drive is acceptable, the particular drive shall be as specified (see 6.2.1). . . ."

Paragraph 6.2.1 lists 29 different procurement requirements or ordering data, identified as "a." through "cc." Requirement "k." states: "If machine drive is to be a specific type, state required type (see 3.4.3)." As to requirement "k.," the "Government Purchase Description" furnished by Viereck and used in the IFB states: "mechanical type per 3.4.3.1 (as amended)."^{1/} There is no question, therefore, but that the specifications required a mechanical type drive.

Two bids were received in response to the IFB. Midwest bid a price of \$61,713 based on supplying a W.A. Whitney brand model 630 CNC Fabricator, for which it provided a complete "technical proposal" even though none was required by this sealed bid solicitation. Exhibit B to Midwest's technical literature explicitly addressed the drive requirements and stated "the machine offered in this proposal has hydraulic type drive." Viereck's bid of \$62,013.95, some \$300 higher, was based on supplying a Strippit brand Super AG model, which was the same item identified in the heading of the purchase description it earlier had provided to the WHCA. Award was made to Midwest as the low bidder.

Upon being advised that the agency had made award to Midwest, Viereck filed an agency-level protest alleging that Midwest's equipment bid was nonresponsive because it did not meet a number of the IFB requirements, including that for a mechanical drive. The Army initially denied Viereck's protest. Viereck submitted a "rebuttal" to the Army, as a result of which the Army subsequently reexamined Midwest's bid and concluded that the Whitney Model 630 did not meet the specifications because a mechanical not hydraulic drive was required. It therefore advised Viereck that Midwest's contract would be terminated for convenience, that the specifications would be rewritten, and that the requirement would be resolicited. Several weeks later, however, the Army reversed itself and advised Viereck that upon further review it had determined that the specifications "when read

^{1/} The "amendment" incorporates a requirement for a "hydraulic overload jaw relief system" which literature submitted by Viereck shows is a feature of the Strippit Super AG machine it offered.

as a whole" allowed for either a mechanical or hydraulic drive system. Moreover, based on information it had recently obtained, the agency further advised Viereck that it did not consider the firm eligible for award because of its "technical assistance" to the government in the preparation of the specifications used in this procurement. This protest followed.

Viereck maintains that there is no basis for the Army's assertion that Viereck is ineligible for an award under this procurement because of the role the firm played with respect to the specifications, since the firm was never under contract to provide "consulting services" to the government. It therefore contends that it is an interested party to protest the award to Midwest, which it states was improper because the Whitney Model 630 on which Midwest bid has a hydraulic drive system which does not meet the solicitation requirements. As a remedy, Viereck asks that the contract be terminated and the requirement resolicited.

The Army first asserts that Viereck was ineligible for any award under this procurement because the company's role with regard to the specifications used in the IFB place it in the type of conflict of interest situation prohibited by the Federal Acquisition Regulation (FAR) § 9.505 and, in particular, FAR § 9.505-2, which contains prohibitions against permitting contractors to furnish items for which they have prepared the specifications. Viereck points out, however, that the Army did not contract with it to prepare the specifications for this procurement but rather, as a vendor, Viereck provided, at the government's request, information on the equipment it had to sell keyed to the relevant military specification's requirements.

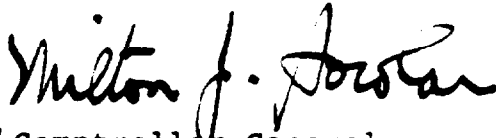
The organizational conflict of interest provisions on which the Army relies are intended to assure that the government receives unbiased advice when it employs a firm--"the contractor"--to prepare specifications used in the competitive procurement of items. Viereck, however, was not hired by the government to prepare the specifications here. The firm was asked by a representative of a government agency which was a potential customer if it could provide "specifications 'for a punch that would meet military specifications,'" and it responded with a document entitled "Government Purchase Description Strippit Super AG" (emphasis added) which described that make and model machine keyed to the ordering data required by the military specification.^{2/}

^{2/} The heading to the purchase description may not have been passed along to Fort Ritchie.

It is not unusual for a potential vendor to draw up and furnish suggested or sample specifications for ordering products of the type it sells. It is the government's responsibility to screen such documents for requirements which do not reflect its actual minimum needs. That did not occur here, it appears to us, because the using agency's technical representative--although well intentioned--was not experienced in drafting specifications and unduly relied on a single vendor. In these circumstances, Viereck's furnishing of the specifications at a potential customer's request should not bar it under the organizational conflict of interest provisions from any award under this solicitation. It therefore is an interested party to protest the responsiveness of Midwest's bid. 4 C.F.R. § 21.0(a) (1989).

With regard to the responsiveness issue, our prior analysis of the IFB's specifications establishes beyond any doubt that they required a mechanical rather than hydraulic drive. The governing military specification permits the use of either type of mechanism but item "k." of the ordering data permits the selection of one to the exclusion of the other. In this case, item "k." required the use of a "mechanical type" drive. It is undisputed that Midwest offered a machine with a hydraulic type drive and its bid therefore was nonresponsive.

We sustain the protest. We note, however, that termination of Midwest's contract and recompetition of the requirement is not feasible since we are advised that performance under the contract is substantially complete. Nevertheless, because we have sustained the protest, Viereck is entitled to its costs of filing and pursuing its protest and of preparing its bid. Bid Protest Regulations, 4 C.F.R. §§ 21.6(d)(1) and (2). Viereck should submit its claim to the Army.



Acting Comptroller General
of the United States